IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-473

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Petitioner,

vs.

JOHN SCHULTZ, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

JOHN E. NORTON
105 West Washington Street
Belleville, Illinois

C. E. HEILIGENSTEIN
30 Public Square
Belleville, Illinois

Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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To the United States Court of Appeals for the Seventh Circuit

Now comes the Petitioner, District No. 9, International Association of Machinists and Aerospace Workers, by John E. Norton of the Bar of this Court, and presents this Petition for Writ of Certiorari to the United States Court of Appeals, for the Seventh Circuit, and respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, in the cause entitled John Schultz, et al., Plaintiffs-Appellants v. Owens-Illinois, Inc., and

District No. 9, International Association of Machinists and Aerospace Workers, Defendants-Appellees, which judgment reversed and remanded the judgment of the United States District Court—Southern District of Illinois, which judgment of the said United States District Court, had dismissed the complaint of the Plaintiffs, John Schultz, et al.

OPINIONS BELOW AND PETITION FOR REHEARING IN BANC, PENDING BELOW

The United States District Court—Southern District of Illinois, filed a Memorandum Order dated December 3, 1976, which is set forth as Appendix "A" to this Petition.

The United States District Court—Southern District of Illinois, filed a Memorandum Order concerning Motion to Amend, Modify and Reverse, dated January 3, 1977, which Order is set forth as Appendix "B" to this Petition.

The United States Court of Appeals for the Seventh Circuit filed an Opinion dated August 19, 1977, which is set forth as Appendix "C" to this Petition.

The Defendant-Appellee Owens-Illinois, Inc., filed a Petition for Rehearing, In Banc, by the United States District Court—Southern District of Illinois, which Petition is dated August 31, 1977, and is set forth as Appendix "D" to this Petition.

JURISDICTION

The date of judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed is August 19, 1977. No Petition for rehearing was sought by Petitioner,

District No. 9, International Association of Machinists and Aerospace Workers and no extension of time within which to seek certiorari was sought by District No. 9, International Association of Machinists and Aerospace Workers.

Petitioner's Co-Defendant-Appellee, Owens-Illinois, Inc., on August 31, 1977, filed a Petition for Rehearing, In Banc, by the United States District Court—Southern District of Illinois, which Petition has not been determined.

Jurisdiction of this Court is conferred by the provisions of United States Code, Title 28, § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

Whether the rights alleged by Plaintiffs-Respondents, Schultz, et al., are *uniquely personal* within the meaning of the provisions of United States Code, Title 29, 185(a).

II

Whether Plaintiffs-Respondents, Schultz, et al., may sue to revoke negotiated changes in a labor contract, which negotiated changes were ratified and adopted by vote of the union membership.

III

Whether the United States Court of Appeals for the Seventh Circuit was correct in basing their opinion, in part, upon statements made outside the record by respondents' counsel during oral argument, which statements were disputed by Petitioner.

STATUTES INVOLVED

United States Code Title 28, 1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. "By writ of certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

United States Code Title 29, 185(a)

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF CASE

Petitioner, District No. 9, International Association of Machinists and Aerospace Workers is the certified bargaining representative of respondents, Schultz, et al., who are employees of the Owens-Illinois, Inc. Respondents are non-journeymen machinist members of a work force of 366 hourly employees of Owens-Illinois, Inc., of which 207 were journeymen master mechanics. Between 1971 and 1974 collective bargaining negotiations were conducted between respondent District No. 9, International Association of Machinists and Aerospace Workers and Owens-Illinois, Inc., to make the theretofore compulsory aspects of an apprenticeship training program optional rather

than mandatory. On or about September 30, 1974, an agreement was reached between Owens-Illinois, Inc., and the petitioner, District No. 9, International Association of Machinists and Aerospace Workers which was reduced to writing and designated as the "Summary of Changes Between Owens-Illinois Administrative Division Machine Manufacturing-Godfrey, Illinois and the International Association of Machinists and Aerospace Workers-District No. 9". Said summary was attached to petitioner's Motion to Dismiss in the United States District Court-Southern District of Illinois, as Exhibit No. 2. The summary, designated as Exhibit No. 2, on page 16 thereof, stated:

> "The company will provide training for present employees when it deems necessary."

Because of the numerical stagnation of the labor force, the apprenticeship training program was not needed after September 30, 1974.

Over three years later and after the union membership, including respondents, had approved the foregoing apprenticeship training modification from a mandatory to a voluntary basis, respondents filed a grievance, dated April 21, 1976, which grievance was heard and denied because it was determined that the apprenticeship program was then on an "as needed" basis. Thereafter on November 24, 1976, respondents, being a small portion of the non-journeymen work force, who, in part, may have been eligible for apprenticeship training, filed suit claiming that *all* employee rights had been violated and the negotiations between the negotiating committee of the union and the employer were fraudulent and in bad faith. Petitioner, District No. 9, International Association of Machinists and Aerospace Workers filed its motion to dismiss, which motion was allowed December 3, 1976, by the United States District Court-Southern District of Illinois, and which was thereafter again allowed, as modified, by the same court in January 3, 1977.

On August 19, 1977, the United States District Court of Appeals for the Seventh Circuit, reversed the United States District Court-Southern District of Illinois, by determining that the collective bargaining agreement of 1974 did establish a mandatory apprenticeship training program; that the rights of respondents were "uniquely personal"; that the Petitioner may not excuse its failure to process the grievance of respondent Schultz on the ground that it was without merit.

Thereafter Petitioner, District No. 9, International Association of Machinists and Aerospace Workers, filed its Petition for Writ of Certiorari, in this cause.

REASONS FOR GRANTING THE WRIT

I

Whether the Rights Alleged by Plaintiffs-Appellants Are Uniquely Personal Within the Meaning of the Provisions of United States Code, Title 29, 185 (a).

No court, to date, has determined, as did the United States District Court of Appeals, in this cause, that the words *"uniquely personal"* apply to *all* persons similarly affected in a bargaining unit.

Paragraph five of respondents' complaint alleges:

> "On December 16, 1974, defendants herein (District No. 9 and Owens-Illinois, Inc.), entered into a collective bargaining agreement covering the employees, (respondents) including each and every plaintiff, in said bargaining unit, which said agreement was in force during the entire period involved herein and remains in force on the date of the filing of this petition. A copy of said agreement is attached hereto as "Exhibit A". Said Agreement was entered into by the defendants (District No. 9 and Owens-Illinois, Inc.), *for the benefit of the employees in said bargaining unit*, and each and every plaintiff, as a member thereof, is accordingly entitled to the benefit of said agreement and to enforce the provisions thereof." (Emphasis added)

Webster's New Collegiate Dictionary, 1976, defines the work unique as:

> "1. being the only one: SOLE
>
> 2. being without a like or equal
>
> 3. very rare or uncommon"

The same dictionary defines personal as:

"1. of, relating to, or effecting a person: PRIVATE

2. done in person without the intervention of another"

From the foregoing it is quite obvious that the negotiated labor contract was not one person but the entire bargaining group of which respondents were but a portion thereof.

A complaint does not state a cause of action under United States Code, Title 29, 185 (a) unless it clearly, on the face of the pleadings, shows or alleges that the cause is one that is "uniquely personal" to the pllaintiff and does not affect the bargaining unit, as a whole. The words "uniquely personal" have been defined in the leading case of *Brown v. Sterling Aluminum Products Corporation*, 365 Fed. 2d 651. There the court said:

> "Therefore individual suits to compel arbitration of individual grievances are permissible as are individual suits to enforce an arbitration award in which the individual had a personal interest . . . However, whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the union as the sole representative of that unit would normally have the standing to enforce the right."

In light of the foregoing language it is apparent and obvious that the opinion of the United States Court of Appeals, in this cause, is clearly in hopeless conflict with the foregoing opinion of the United States Court of Appeals of the Eighth Circuit, which obvious conflict can only be ultimately settled and determined by the United States Supreme Court. The definition of what rights an individual employee has to bring suit for a violation of a union contract was determined in *Smith v. Evening News Association*, 371 U. S. 195; *Humphrey v. Moore*, 375

U. S. 335 and *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554, 96 S. Ct. 1048, 1055.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554, 96 S. Ct. 1048, at 1055, this Court defined an individuals right to sue as follows:

> "Section 301 (Title 29, 185(a)) contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications § 301 suits encompass those seeking to vindicate 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge." (Parenthesis added)

This Court has recognized that not every employee or dissident group of employees holds the right to controvert every employer-union agreement and that bargaining over broad policy issues is the exclusive province of the union; *Ford Motor Company v. Huffman*, 345 U.S. 330, 338; *May Department Stores Inc. v. N.L.R.B.*, 326 U. S. 376. As the Court notes in *Brown v. Sterling Aluminum Products Corporation*, 365 Fed. 2d 651, cert. denied, 386 U. S. 957:

> "We believe, however, that for an individual to bring an action under § 301 he must be seeking to enforce a right that is personal to him and vested in him at the time of the suit. Humphrey v. Moore, 375 U. S. 335, 55 LRRM 2031 (1964). Therefore individual suits to compel arbitration of individual grievances are permissible as are individual suits to enforce an arbitration award in which the individual has a personal interest. Smith v. Evening News Association, supra. However, whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the Union as the sole representative of that unit would normally have the standing to enforce the right. Thus the individual would

have no standing to compel discussion of broad collective bargaining principles such as the re-negotiation of a new contract or the re-location of a plant, even if such discussion were required by the existing collective bargaining agreement. Section 159 (a) of the Act designates the representatives selected by a majority of the employees in a unit, which in most cases would be a Union, to 'be the exclusive elected representatives of all the employees in that unit for the purpose of collective bargaining.' It is the Union alone that has the right to bargain with management on these broad policy issues."

It is therefore, in conclusion, apparent from the contract itself that the rights, if any, of an apprenticeship program belongs to the entire unit and not solely or personally to the twenty-five respondents herein.

II

Whether Plaintiffs-Respondent, Schultz, et al., May Sue to Revoke Negotiated Changes in a Labor Contract, Which Negotiated Changes Were Ratified and Adopted by Vote of the Union Membership.

The Petitioner must have the freedom to bargain in good faith and to make a determination, also in good faith, as to what grievances are meritorious or frivolous. In *Humphrey v. Moore*, 375 U. S. 335, at 349, this Court said:

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievances process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact.

> To remove or gag the union in these cases would surely weaken the collective bargaining and grievance process."

Respondent's complaint seeks both damages for an alleged breach of the petitioner's duty of fair representation and also seeks specific performance of the contracts covering the 1971-1974 period. As was shown regarding the claim for damages, the Court of Appeals erroneously dispensed with the proof required to establish such a claim. With respect to the claim for specific performance, the Court intruded into an area entirely forbidden to it as a matter of law; *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593.

The Court of Appeals improperly determined that the union membership vote on or about September 30, 1974, to modify the apprenticeship training program from a mandatory to a voluntary one did not change the mandatory aspects of the program. The opinion made such a determination without anything in the record from anyone as to what the negotiations were that lead up to the change voted upon September 30, 1974.

III

Whether the United States Court of Appeals for the Seventh Circuit Was Correct in Basing Their Opinion, in Part, Upon Statements Made Outside the Record by Respondents' Counsel During Oral Argument, Which Statements Were Disputed by Petitioner.

The United States Court of Appeals improperly reversed the order of the United States District Court-Southern District of Illinois, entered January 3, 1977, by supplying statements accepted by the Circuit Court of Appeals from counsel for re-

spondents, which was not part of the record and which were disputed in oral argument by the petitioner's counsel. That dispute is disregarded and not referred to in the opinion of the United States Court of Appeals.

Some of the glaring erroneous statements of respondents' counsel, accepted as fact, but not in the record, by the United States Court of Appeals, appear in the opinion, as follows:

> . . . "*Supposedly* in breach of Article 20, no employee of defendant Company has been classified as an apprentice since May 22, 1975, nor allowed to enter the Apprentice Program well before then. *This failure* of defendant Company to place eligible employees into an apprenticeship program has allegedly deprived plaintiffs of an opportunity to increase their skills and training and improve their wages." (Emphasis added) (Page 3.)

"As a result of the Company's failure to carry out its Article 20 apprenticeship program and the *Union's breach of its duty of fair representation*, plaintiffs assertedly lost the earnings difference between their current rate of pay and the higher rate of pay that they would have earned as Master Machinists." (Emphasis added) (Page 4.)

"The Company will provide training for present employees when it deems it necessary." But this clause only governs changes in job classifications reflected in the new Appendix "A" to the December 16, 1974, collective bargaining agreement and in no way concerns Article 20." (Page 6-7.)

"These plaintiffs are not seeking to represent the entire work force of 366 employees. *According to their counsel at oral argument*, plaintiffs are the 25 most senior employees on a list maintained by the company of employees who are qualified to become apprentices. Various preliminary tests must be met in order to be eligible for apprenticeship in the first instance and, of this initial eligibility group, further tests and classes conducted outside the plant are required in order to be placed on the list. Traditionally, the list-qualified employee with the highest seniority would take the next available spot in the apprenticeship program assuming this individual was below the absolute age limit for beginning apprentices. *Plaintiffs are asserted to be the very large majority of the list-qualified employees. Defendants rightly point out that none of these specifics were alleged in the complaint or appear anywhere in the record.*" (Emphasis added) (Page 7.)

"Also, either under the plaintiffs' counsel's representations at oral argument or the versions of the hearing in the record, plaintiffs have alleged a factual predicate which establishes the necessary and sufficient circumstances precedent to the actual vesting of the employment entitlement." (Page 8.)

"The union contends that the complaint alleges 'all employees' have been denied access to the apprenticeship program, so that the plaintiffs are not seeking to enforce any personal rights. However, a reading of the whole complaint discloses that only 25 employees, eligible as of the time of the complaint, are suing to enforce the apprenticeship program. Of the 366 employees, 207 are journeymen master mechanics and 159 are non-journeymen (Union Br. 2). *Plaintiffs' counsel advised at oral argument that his 25 clients represent the 'bulk' of those qualified to be apprentices.*" (Emphasis added) (Page 9.)

"Only the named plaintiffs have any vindicatable rights under the 1974 collective bargaining agreement since they are the only employees that filed suit on this contract while it was still in force." (Page 10.)

As is obvious there are more facts not in this record, relied upon by the United States Court of Appeals to base its opinion

that are actually in the record. It is beyond belief that a Court of Appellate jurisdiction could permit counsel, at oral argument, to go far beyond the record presenting such argument and then adopt counsel's statements, which were in dispute at the oral argument, as fact. The error of the foregoing is obvious, as the Opinion goes far beyond established precedent and clearly refuses to follow established precedent.

CONCLUSION

Wherefore, Petitioner prays that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOHN E. NORTON
105 West Washington Street
Belleville, Illinois

C. E. HEILIGENSTEIN
30 Public Square
Belleville, Illinois

APPENDIX

APPENDIX A

In the United States District Court
Southern District of Illinois
Southern Division

John Schultz, et al.,
Plaintiffs,
v.
Owens-Illinois, Inc., et al.,
Defendants.
A-Civ-76-0080

MEMORANDUM ORDER

(Filed December 3, 1976)

This case is before me on defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted. In this connection I have considered the briefs and authorities submitted by counsel as well as the oral arguments presented on December 2, 1976. At the oral argument defendants submitted Defendants' Exhibit 2 which is or purports to be a "summary of change between Owens-Illinois Administrative Division Machine Manufacturing, Godfrey, Illinois, and the International Association of Machinists and Aerospace Workers, District No. 9" and plaintiff specifically abandoned its position that the hearing was called without sufficient notice as stated in its pleading filed herein on November 24, 1976.

The defendant Owens-Illinois, Inc., entered into a collective bargaining agreement with defendant District No. 9, International Association of Machinists and Aerospace Workers. Section 20 of the agreement provides:

ARTICLE 20

Apprentices

Section 1. It is agreed that the terms and the conditions of the Apprenticeship standards for machinists as developed by the International Association of Machinists, and Aerospace Workers District No. 9, shall remain in effect for the life of this contract. By agreement of the Union and the Company, the Apprenticeship Program in the Machine Manufacturing Shop has recognized and continues to recognize the practice of a restricted pool, that is, the selection of Apprentices from personnel within the shop in conjunction with the District No. 9 Joint Apprenticeship Committee.

Section 2. The normal ratio of apprentices shall be one (1) apprentice to every eight (8) Master Machinist in the department. Apprentices shall serve for a period of 8,000 hours in accordance with the Federal Apprenticeship Standard Agreement.

Section 3. Apprentice Rates

Job No.	Percent of Job No. U-11 Master Machinist
U-63 Apprentice—8th Period	94%
U-65 Apprentice—7th Period	88%
U-67 Apprentice—6th Period	83%
U-69 Apprentice—5th Period	78%
U-71 Apprentice—4th Period	73%
U-73 Apprentice—3rd Period	68%
U-75 Apprentice—2nd Period	63%
U-77 Apprentice—1st Period	58%

Apprentice rates shall be increased effective the first day of a new period following each 1,000 hours of employment.

Section 4. Normally apprentices shall not be used to instruct or train other apprentices. Instructing and training shall normally be done by Master Machinist or qualified operators.

The standing of individual union members to sue their employers as authorized by Section 301 of the Labor Management Sanctions Act, 29 U.S.C. § 185, is presented as a threshold question. Plaintiffs are individual union members who bring this suit claiming that the company's failure to provide an apprenticeship program violates their rights under the contract.

Ordinarily the union under Section 301 is the proper party to enforce the collective bargaining agreement. An exception to this rule is where the right sought to be vindicated is "uniquely personal" and rights of employees such as wages, hours, overtime pay and wrongful discharge. In this type of situation the individual may maintain suit under 301.

In my opinion the question of the duty of the company to maintain an apprenticeship program under the collective bargaining agreement is not "uniquely personal" to plaintiffs. From that conclusion it follows that plaintiffs lack standing to maintain this suit.

Although it is not necessary to reach the other points raised by defendants, I, nevertheless, agree that those points are well taken and require that the complaint herein be dismissed.

Based on the authorities cited I have no alternative but to dismiss the comylaint for failure to state a claim on which relief can be granted.

So ordered.

Enter this 3 day of December, 1976.

/s/ J. WALDO ACKERMAN
United States District Judge

APPENDIX B

In the United States District Court
Southern District of Illinois
Southern Division

John Schultz, et al,
Plaintiffs,
v.
Owens-Illinois, Inc., et al,
Defendants.
} A-Civ-76-0080

Memorandum Order Concerning Motion to Amend, Modify and Reverse

(Filed January 3, 1977)

Plaintiffs bring these motions concerning the Memorandum Order entered by this Court on December 3, 1976. Plaintiffs first seek pursuant to Federal Rule of Civil Procedure 52(b) to have this Court amend, modify and reverse its Order of December 3 dismissing plaintiffs' action for failure to state a claim on which relief could be granted.

That decision was premised on the conclusion that plaintiffs lacked standing to sue under Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185) because the rights they sought to enforce under the collective bargaining agreement were not "uniquely personal" to plaintiffs. Plaintiffs contend that even if the rights sought to be enforced are not uniquely personal but rather flow to employees in general a § 301 action will lie if the petition alleges a breach of the duty of fair representation on the part of the union. I do not believe this to be the current state of the law.

It is clear that individuals may bring suit under § 301 to enforce the provisions of a collective bargaining agreement under

certain circumstances. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 555, 562; *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). An allegation that the union involved breached its duty of fair representation will allow an individual to press his claims in the district court in spite of a defense that the employee failed to exhaust his contractual remedies, *Vaca v. Sipes*, 386 U.S. 171, 186 (1967) or in spite of the fact that the normally final decision of an arbitrator has been rendered against the individuals pressing the suit. *Hines v. Anchor Motor Freight, Inc., supra.*

However, I believe that a threshold question before reaching any question of any breach of the duty of fair representation is whether the rights sought to be enforced are uniquely personal to the plaintiffs or whether they flow to the employees in general. It is clear that before an individual may bring an action pursuant to § 301 the rights asserted must be personal to him and vested in him at the time of the suit. *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651, 657 (8th Cir. 1966), *cert. den.* 386 U.S. 957 *reh. den.* 386 U.S. 1027 (1967).

Plaintiffs have cited no case which either dissuades me from this reasoning or would compel me to depart from my original conclusion that the duty of the company to maintain an apprenticeship program does not involve any rights uniquely personal to plaintiffs. Therefore, plaintiffs' motion to amend, modify and reverse shall be denied.

Plaintiffs' second motion to reduce security bond required of appellant, however, in light of defendants' acquiescence, and the reasoning presented in plaintiffs' motion, will be granted.

Plaintiffs' motion to amend, modify and reverse is denied. Bond for costs on appeal shall be fixed at fifty dollars ($50.00).

Enter this 3 day of January, 1977.

/s/ J. WALDO ACKERMAN
United States District Judge

APPENDIX C

In the United States Court of Appeals
for the Seventh Circuit

No. 77-1078

JOHN SCHULTZ, et al.,

Plaintiffs-Appellants,

v.

OWENS-ILLINOIS, INC., and DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

No. A-Civ-76-0080—**J. Waldo Ackerman,** *Judge.*

HEARD MAY 24, 1977—DECIDED AUGUST 19, 1977

Before SWYGERT and CUMMINGS, *Circuit Judges,* and MARKEY, *Chief Judge* of U. S. Court of Customs and Patent Appeals.*

CUMMINGS, *Circuit Judge.* Plaintiffs are 25 employees at the Godfrey, Illinois, machine manufacturing shop operated by defendant Owens-Illinois, Inc., an Ohio corporation. They are

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* The Honorable Howard Thomas Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

members of co-defendant union.[1] Plaintiffs filed this complaint under Section 301 of the Labor-Management Relations Act (29 U.S.C. § 185).

According to the complaint, the Union represents plaintiffs and other employees at the Godfrey plant. On December 16, 1974, Owens-Illinois and the Union entered into a collective bargaining agreement expiring on March 31, 1977. Plaintiffs charge that this agreement was entered into by defendants for the benefit of the employee union members, so that each plaintiff is "entitled to the benefit of said agreement and to enforce the provisions thereof" (Complaint ¶ 5):

Article 20 of the agreement provided:

Apprentices

"Section 1. It is agreed that the terms and the conditions of the Apprenticeship standards for machinists as developed by the International Association of Machinists, and Aerospace Workers, District No. 9, *shall* remain in effect for the life of this contract. By agreement of the Union and the Company, the Apprenticeship Program in the Machine Manufacturing Shop has recognized and continues to recognize the practice of a restricted pool, that is, the selection of Apprentices from personnel within the Shop in conjunction with the District No. 9 Joint Appenticeship Committee.

"Section 2. The normal ratio of apprentices *shall* be one (1) apprentice to every eight (8) Master Machinists in the department. Apprentices *shall* serve for a period of 8,000 hours in accordance with the Federal Apprenticeship Standard Agreement.

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[1] District No. 9, International Association of Machinists and Aerospace Workers.

"Section 3. Apprentice Rates

Job No.	Percent of Job No. U-11 Master Machinists
U-63 Apprentice—8th Period	94%
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U-73 Apprentice—3rd Period	68%
U-75 Apprentice—2nd Period	63%
U-77 Apprentice—1st Period	58%

"Apprentice rates *shall* be increased effective the first day of a new period following each 1,000 hours of employment.

"Section 4. Normally apprentices *shall* not be used to instruct or train other apprentices. Instructing and training *shall* normally be done by Master Machinists or qualified operators." (Italic emphasis supplied; bold face emphasis in original).

Supposedly in breach of Article 20, no employee of defendant Company has been classified as an apprentice since May 22, 1975, nor allowed to enter the Apprentice Program well before then. This failure of defendant Company to place eligible employees into an apprenticeship program has allegedly deprived plaintiffs of an opportunity to increase their skills and training and improve their wages.

Plaintiff Schultz protested the absence of an apprentice program to his Union, and it filed a grievance on his behalf in April 1976. This grievance was processed pursuant to the grievance

procedure of Section 1 of Article 21 of the contract and rejected by defendant Company. Defendant Union refused to submit the grievance to arbitration under Section 2 of that Article. According to plaintiffs, the defendants conspired to defeat plaintiff Schultz' grievance, for in 1971 they had secretly agreed to eliminate the apprenticeship program in breach of the Union's duty of fair representation under 29 U.S.C. § 141.

As a result of the Company's failure to carry out its Article 20 apprenticeship program and the Union's breach of its duty of fair representation, plaintiffs assertedly lost the earnings difference between their current rate of pay and the higher rate of pay that they would have earned as Master Machinists. Moreover, because of the maximum age limit for apprentices, some plaintiffs, including plaintiff John Schultz, were permanently deprived of the opportunity of becoming apprentices, thus depriving them of Master Machinists' wages for the remainder of their working lives.

Plaintiffs sought a declaratory judgment that defendant Company violated Apprenticeship Article 20 of the agreement and that the defendant Union breached its duty of fair representation of plaintiffs. They also sought compensatory damages of $500,000 and exemplary or punitive damages of $500,000, and an order compelling the Company to abide by Apprenticeship Article 20 of the collective bargaining agreement by reinstating the apprenticeship program.

On September 21, 1976, defendant Union filed a motion to dismiss, asserting that the collective bargaining agreement was governed by the "Standards of Apprenticeship"[2] which supposedly did not require defendant company to continue an apprentice program when it "did not have sufficient available work

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[2] These standards were those incorporated by reference in Section 1 of Article 20 and are reproduced in the Supplemental Appendix to the Union's brief.

to continue said program or full employment with its present journeymen employees." The motion also stated that the grievance procedure in Article 21 of the collective bargaining agreement did not require the Union to arbitrate plaintiff Schultz' grievance because it was "totally without merit." The other ground of the motion to dismiss was that the complaint failed to state a cause of action under 29 U.S.C. § 414 *et seq.*, the sections of Labor-Management Relations Act plaintiffs mistakenly had relied on with regard to the Union's alleged failure of fair representation before their September 24, 1976, amendment charging a breach of 29 U.S.C. § 141 *et seq*. The Company also filed a motion to dismiss, asserting that the complaint failed to state a claim.

In December 1976, the district court handed down a memorandum order dismissing the complaint for failure to state a claim. The court held that plaintiffs could not maintain a suit under Section 301 of the Labor-Management Relations Act because "the question of the duty of the company to maintain an apprenticeship program under the collective bargaining agreement is not 'uniquely personal' to plaintiffs."

A month later, the district court handed down another memorandum order refusing to modify its previous order. Plaintiffs maintained that even if the rights sought to be enforced were not uniquely personal, a § 301 action will lie because of the allegation of the breach by the Union of its duty of fair representation. The court reiterated that "before an individual may bring an[y] action pursuant to § 301, the rights asserted must be personal and vested in him at the time of the suit," citing *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651, 657 (8th Cir. 1966), certiorari denied, 386 U.S. 957. We reverse.

Ever since *Smith v. Evening News Ass'n*, 371 U.S. 195, 198-200, it is clear that Section 301 permits suits by employees against their employer and union when they are seeking to vindi-

cate uniquely personal rights granted them by the collective bargaining agreement. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562; *Vaca v. Sipes*, 386 U.S. 171.[3] Both defendants urge this Court to affirm on the ground that plaintiffs do not have any "uniquely personal" rights to be trained as apprentices, so that Section 301 of the Labor-Management Relations Act affords them no remedy. We disagree.

To determine whether the rights plaintiffs seek to vindicate are "uniquely personal" rather than rights possessed by the bargaining unit as a whole, it is necessary to refer to Article 20, *supra*, of the collective bargaining agreement that was in effect until March 31, 1977. All four sections of the Article are in mandatory terms. The key section here is Section 2 providing that the normal ratio of apprentices shall be one to every eight Master Machinists. Defendants seek comfort in the Standards of Apprenticeship referred to in Section 1 of Article 20. However, Article 18 of those Standards, entitled "Ratio of Apprentices to Journeymen", provides:

> "Ratio of apprentices to journeymen shall be in conformity with present or subsequent bargaining agreements between the employer and District No. 9" (Sup. App. 40).

As seen, that mandatory ratio is one apprentice to eight Master Machinists.[4]

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[3] Although defendant Company relies on *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, there the Supreme Court pointed out that as part of the national labor policy Congress has assured that minority employee voices should be heard and that a union must represent the interests of minorities within the unit fairly and in good faith. 420 U.S. at 64.

[4] Because of this mandatory provision in Article 18 together with Article 20 of the bargaining agreement, four fragmentary phrases that the Union has selected from Articles 3, 5, 7 and 18 of the Standards of Apprenticeship relating to the employer's prerogatives vis-a-vis any particular apprenticeship applicant are irrelevant and do not transform this apprenticeship program into a voluntary one.

Defendants also contend that a September 30, 1974, "Summary of Changes Between Owens-Illinois Administrative Division Machine Manufacturing—Godfrey, Illinois and the International Association of Machinists and Aerospace Workers—District No. 9" modified the apprenticeship program from a mandatory to a voluntary one. On the contrary, that Summary of Changes was referring to the changes that the December 16, 1974, collective bargaining agreement was making in the previous collective bargaining agreement, and Article 8 of the Summary, the only article of the Summary referring to apprentices, states that the provisions of the earlier collective bargaining agreement "Remain as written" (Sup. App. 49). The clause in the Summary upon which defendants rely states "The Company will provide training for present employees when it deems it necessary." But this clause only governs changes in job classifications reflected in the new Appendix "A" to the December 16, 1974, collective bargaining agreement (Sup. App. 22-23, 62) and in no way concerns Article 20. Nothing in the Standards of Apprenticeship or in the Summary relieves defendants from the compulsory apprenticeship program established by Article 20 of the collective bargaining agreement.

These plaintiffs are not seeking to represent the entire work force of 366 employees (Union Br. 2). According to their counsel at oral argument, plaintiffs are the 25 most senior employees on a list maintained by the company of employees who are qualified to become apprentices. Various preliminary tests must be met in order to be eligible for apprenticeship in the first instance and, of this initial eligibility group, further tests and classes conducted outside the plant are required in order to be placed on the list. Traditionally, the list-qualified employee with the highest seniority would take the next available spot in the apprenticeship program assuming this individual was below the absolute age limit for beginning apprentices. Plaintiffs are asserted to be the very large majority of the list-qualified employees.

Defendants rightly point out that none of these specifics were alleged in the complaint or appear anywhere in the record. However, in a hearing before Judge Ackerman, plaintiffs' counsel conclusorily claimed each named plaintiff would, with certainty, become an apprentice if the program was in effect. This hearing was not transcribed and an authorized summary pursuant to F.R.A.P. 10(c) was not entered because the district judge's recollection of the hearing was not precise enough to settle the dispute between the plaintiffs and the defendants concerning what was said therein. However, the district court did include the parties' differing versions of the hearing in the record on appeal. The defendants' version does not dispute the plaintiffs' statement concerning the certainty that the plaintiffs would be granted apprenticeships if anyone was granted one.

Overtime and discharge and other rights which have been deemed to be "uniquely personal" possess two unifying themes. *Smith v. Evening News Ass'n*, 371 U.S. 195, 199-200. First, the employment benefit is mandatory under the collective bargaining agreement if certain circumstances have occurred. Second, a factual predicate which is unique and personal to a particular employee establishes these necessary and sufficient circumstances. For example, in order to obtain overtime, a given employee must work a period longer than his normal shift, but perhaps a limit on the amount of overtime which can be worked in a given period is also set. Under this example, given mandatory overtime rights in the contract, a particular employee who works overtime still must show he meets the maximum hours criterion before he is actually entitled to overtime pay.

Applying these things to the plaintiffs, we have demonstrated that the apprenticeship program was mandatory under the collective bargaining agreement which was in effect at the time the plaintiffs filed suit. Also, either under the plaintiffs' counsel's representations at oral argument or the versions of the hearing

in the record, plaintiffs have alleged a factual predicate which establishes the necessary and sufficient circumstances precedent to the actual vesting of the employment entitlement. Therefore, it was entirely appropriate for them to sue their employer and the Union under Section 301. *National Labor Relations Board v. Local 485, International Union of Electrical, Radio and Machine Workers*, 454 F.2d 17, 21 (2d Cir. 1972); *Emmanuel v. Omaha Carpenters District Council*, 535 F.2d 420, 423 (8th Cir. 1976).

Defendants rely almost exclusively on *Brown v. Sterling Aluminum Products Corporation, supra.* However, the *Brown* court recognized that individuals may bring an action under Section 301 where, as here, they are seeking to enforce personal rights vested in them at the time of the suit. As noted, these individuals are not seeking a right possessed by the bargaining unit as a whole[5] and are not seeking to compel any collective bargaining. Only untrained employees are seeking controlled training of a high quality in order to improve their earning power. This factor sharpens the uniquely personal nature of the right being sought, for the union membership as a group and recognized journeymen as well would receive no benefits from apprenticeships Article 20. Only the beneficiaries of rights under Article 20 have brought this suit, so that defendants and the court below are mistaken in asserting that plaintiffs' claim related to an entire bargaining suit. Therefore, even the *Brown* court would accord them standing to sue. See 365 F.2d at 657. Because the Union will not enforce plaintiff's apprenticeship

[5] The Union contends that the complaint alleges "all employees" have been denied access to the apprenticeship program, so that the plaintiffs are not seeking to enforce any personal rights. However, a reading of the whole complaint discloses that only 25 employees, eligible as of the time of the complaint, are suing to enforce the apprenticeship program. Of the 366 employees, 207 are journeymen master mechanics and 159 are non-journeymen (Union Br. 2). Plaintiffs' counsel advised us at oral argument that his 25 clients represent the "bulk" of those qualified to be apprentices.

rights, a Section 301 suit is the appropriate remedy. *Emmanuel, supra*, 535 F.2d at 423.

Lastly, the Company relies on Article 1, the Management Rights Article[6] contained in the December 16, 1974, collective bargaining agreement, but it does not even refer to apprentice training. Additionally, that article excepts from Management Rights matters "expressly modified by the specific provisions of this agreement." Article 20, the Apprenticeship article, is such a modification. Section 2 of Article 20 creates an affirmative obligation to provide an apprenticeship program while controlling the numbers of apprentices per journeymen. Otherwise, it would be virtually meaningless.

Plainly plaintiffs are seeking to protect rights afforded them under the collective bargaining agreement in force when their complaint was filed. Therefore, there is no occasion for us to decide whether they have any rights under the succeeding collective bargaining agreement whereby the apprenticeship program has apparently been made discretionary with the Company.[7] Although the Company complains that if Article 20 is enforced, there will be an impact of excessive costs upon the

[6] Article 1 provides:

"MANAGEMENT RIGHTS

"It is agreed that the Company is vested exclusively with the management of the business, including the hiring and direction of the working force; the right to establish, change or introduce new or improved methods, job duties and crew sizes, standards or facilities. *Except as expressly modified by the specific provisions of this Agreement*, and subject to the grievance and arbitration procedure provided herein, the Company has the right to promote, suspend, demote, discipline, or discharge for just cause; and the right to relieve employees from duty because of lack of work by plant seniority or for other legitimate reasons." (Sup. App. 3) (emphasis supplied)

[7] This information was conveyed at oral argument but is not reflected in the record.

Company (Br. 12), that situation was evidently overcome under the new collective bargaining agreement. Only the named plaintiffs have any vindicatable rights under the 1974 collective bargaining agreement since they are the only employees that filed suit on this contract while it was still in force.

As restated in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299, the union members may sue under Section 301 of the Labor-Management Relations Act to enforce rights conferred on them by an employer's promises in the collective bargaining agreement, and the union is a proper additional defendant if, as here, plaintiffs allege that their union breached the duty of fair representation. *Humphrey v. Moore*, 375 U.S. 335. Paragraph 10 of the complaint is sufficient to state a claim against the Union because it alleges that the negotiations between defendants with respect to Schultz' grievance were spurious and carried on in bad faith because of the Union's prior informal agreement with the Company to eliminate the apprenticeship program. If those allegations can be proved, it would have been futile for the other plaintiffs to file similar grievances. *Vaca v. Sipes*, 386 U.S. 171.

In remanding this case to the district court, we are not foreclosing any legitimate defenses the defendants may have relative to whether which or any of the ostensibly eligible plaintiffs would actually have been granted apprenticeship status. Nor do we express any view respecting the remedy to be afforded any ultimately prevailing plaintiff. We do hold that Article 20 of the December 16, 1974, collective bargaining agreement establishes a mandatory apprenticeship program and that it was not made voluntary by the Standards of Apprenticeship or by the September 30, 1974, Summary of Changes. Since plaintiff Schultz' grievance was meritorious on its face, defendant Union may not excuse its failure to process the grievance to arbitration on the ground that it was without merit.

The orders of December 3, 1976, and January 3, 1977, are reversed, and the cause is remanded for further proceedings consistent herewith.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

United States Court of Appeals
For the Seventh Circuit

No. 77-1078

John Schultz, et al.,
Appellants,

v.

Owens-Illinois, Inc., and
District No. 9, International Association of
Machinists and Aerospace Workers,
Appellees.

Petition for Rehearing In Banc by
United States District Court
Southern District of Illinois-Southern Division

Brief of Petitioner
Owens-Illinois, Inc.

THOMAS M. HANNA
1153 Pierre Laclede Building
7701 Forsyth Boulevard
St. Louis, Missouri 63105
A/C 314-863-0355
Attorney for Owens-Illinois, Inc.

Of Counsel:

McMAHON, BERGER, BRECKENRIDGE,
HANNA, LINIHAN & CODY
1153 Pierre Laclede Building
7701 Forsyth Boulevard
St. Louis, Missouri 63105
A/C 314-863-0355

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Preliminary Statement

Owens-Illinois, Inc., the Appellee-Petitioner herein, respectfully petitions this Court for Rehearing In Banc of its decision of August 19, 1977 in the above-entitled case.

In an Opinion by Circuit Judge Cummings, joined in by Circuit Judge Swygert, and Markey, Chief Judge of U. S. Court of Customs and Patent Appeals, this Court held:

(a) That the existence and administration of an apprenticeship program between an Employer and Union was a "uniquely personal" right permitting suits by individual employees against their Employer and Union (Pg. 5-6), and such a determination is unique in that no other Circuit Court has so held and the Supreme Court has held that only wages, hours, overtime pay and wrongful discharge are within the class of personal rights for which an individual employee may bring suit. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554.

(b) This Court also determined that the collective bargaining agreement in effect between the Petitioner herein and the Union representing the employees established a mandatory ratio of one (1) apprentice to every eight (8) master machinists as claimed by the employees bringing suit, said decision having been made by the Court from the contract without benefit of

evidence (Pg. 6-11) and in a manner which contravenes the Supreme Courts mandate that such interpretation may be made only when supported by "substantial evidence," *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971), or when properly determined by an impartial arbitrator. *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564 (1960).

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Statement of Issues

1. Whether or not the apprenticeship program incorporated by reference into the collective bargaining agreement between the Union and the Company creates rights among the employees which are so "uniquely personal" as to vest appellants with the power of suit pursuant to Section 301 of the Labor-Management Relations Act as amended?

2. Is the Court entitled to interpret the collective bargaining agreement in favor of the plaintiffs below rather than an arbitrator and, if so, may that interpretation be made before the defendant's below have presented their evidence relating to the section of the contract relating to the apprenticeship program?

Statement of the Case

Appellants[1] brought this action pursuant to Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185(a)[2] alleging, *inter alia* that no employee had been per-

[1] Hereinafter referred to as the "Plaintiffs".

[2] Which states in pertinent part:
"(a) Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy . . ."

mitted to enter a contractually established apprenticeship program for some year and one-half because of an alleged agreement between Appellees Owens-Illinois and District 9, International Association of Machinists and Aerospace Workers[3] to eliminate said program (A 3-4). The Plaintiff also alleged that its members had grieved over the failure to enroll them as apprentices and further that the grievance was not processed through arbitration because District 9 engaged in conduct which was

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both "spurious" and in "bad faith" (A 3-4). The Complaint also alleged that the grievance was not pursued because of an alleged "informal agreement" between Owens-Illinois and District 9 which eliminated the grounds upon which said grievance could have been otherwise brought (A 3-4). This "informal agreement" occurred during the 1971 contract talks (A 4).

The current collective bargaining agreement[4] spans the period October 1, 1974 through March 31, 1977; consequently, allegations concerning the "informal agreement" subsume that the same was reached during negotiations for the preceding contract.

The current collective bargaining agreement contains the following provisions which the court relied upon to reach its decision:

* * *

[3] Hereinafter referred to as "Owens-Illinois" and "District 9" respectively.

[4] Attached as Exhibit "A" to Complaint (A 3). Not included in the Appendix, but pertinent parts are reproduced herein as part of Owens-Illinois Brief.

ARTICLE 20

Apprentices

"Section 1. It is agreed that the terms and the conditions of the Apprenticeship standards for machinists as developed by the International Association of Machinists, and Aerospace Workers, District No. 9, shall remain in effect for the life of this contract. By agreement of the Union and the Company, the Apprenticeship Program in the Machine Manufacturing Shop has recognized and continues to recognize the practice of a restricted pool, that is, the selection of Apprentices from personnel within the Shop in conjunction with the District No. 9 Joint Apprenticeship Committee.

Section 2. The normal ratio of apprentices shall be one (1) apprentice to every eight (8) Master Machinist in the department. Apprentices shall serve for a period of 8,000 hours in accordance with the Federal Apprenticeship Standard Agreement.

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No evi[illegible]ce was before the Court relating to collective bargaining for the 1971 and 1974 contracts reflecting the intent and agreement of the parties, the egregious surplus of journeymen machinists from 1971 to present, and the full discussions between the employees and union at the time of ratification other than the "Summary of Changes" (Sup. App. 49). Further no evidence was before the court hearing upon the alleged "spurious" and "bad faith" nature of the alleged "informal agreement". Finally no evidence was before the Court relating to any arbitrary or invidious discrimination practiced against the complaining employees.

Argument

A. Apprenticeship is not a uniquely personal right until such time as an employee is designated as an "apprentice".

The first decision to sharply define the right of an individual employee to bring suit for an alleged violation of a union contract was that of *Smith v. Evening News Association*, 371 U.S. 195 (1962). There the Supreme Court held that employees had the right to sue their employer for refusing to assign them work because "the rights of individual employees concerning rates of pay and conditions of employment are a major focus of . . . collective bargaining agreements". Since that time the Supreme Court has recognized the individual's right to sue over matters such as seniority standing. *Humphrey v. Moore*, 375 U.S. 335 (1964), and in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 at 1055 (1976), the Supreme Court defined the individual's right to sue as:

> "Section 301 contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications § 301 suits encompass those seeking to
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> 4
>
> vindicate 'uniquely personal' rights of employees such as *wages, hours, overtime pay*, and *wrongful discharge*." (Emphasis added).

The line must be drawn somewhere to distinguish between those things personal and those which impact upon all union members for there to be a distinction with a difference. Insofar as counsel is aware no court of appeals has ever determined the subject matter of apprenticeship to be a "uniquely personal" right and submits that it cannot be such until an employee

actually enters the apprenticeship program. The Supreme Court has recognized that not every employee or dissident group of employees holds the right to controvert every employer-union agreement by urging his own interpretation thereof because the union, as the exclusive representative of *all* employees in the bargaining unit, must be allowed "[a] wide range of reasonableness . . . in serving the unit it represents". *Ford Motor Company v. Huffman*, 345 U.S. 330, at 338 (1953). This theory prevails even if the union's decision should cause some of its members to lose their employment or other contractual benefits, *e.g. Humphrey v. Moore, supra.* Thus the act of bargaining over broad policy issues is the exclusive province of the union and vested solely in that agency, who must exercise that right for the benefit of *all* members. *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376 (1945). As was noted by the Court in *Brown v. Sterling Aluminum Products Corporation*, 365 F. 2d 651 (8th Cir. 1966), cert. denied, 386 U.S. 957:

> "We believe, however, that for an individual to bring an action under § 301 he must be seeking to enforce a right that is personal to him and vested in him at the time of the suit. *Humphrey v. Moore*, 375 U.S. 335, 55 LRRM 2031 (1964). Therefore

individual suits to compel arbitration of individual grievances are permissible as are individual suits to enforce an arbitration award in which the individual has a personal interest. *Smith v. Evening News Association, supra.* However, whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the Union as the sole representative of that unit would normally have the standing to enforce the right. Thus the individual

> would have no standing to compel discussion of broad collective bargaining principles such as the re-negotiation of a new contract or the re-location of a plant, even if such discussion were required by the existing collective bargaining agreement. Section 159(a) of the Act designates the representatives selected by a majority of the employees in a unit, which in most cases would be a Union, to 'be the exclusive elected representatives of all the employees in that unit for the purpose of collective bargaining.' It is the Union alone that has the right to bargain with management on these broad policy issues."

It is apparent from the contract itself that the apprenticeship program belongs to the entire unit and not to the tweny-five (25) plaintiffs here. As such the union, not the individual member controls the scope and application of the contract as the economics surrounding the apprentice program may have a vital effect upon every employee, including journeymen. Even if the apprenticeship program were deemed to be a "vested right" the union would retain the power to apply the contract for the best interests of all the members. Thus:

> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the

rights of those whom he represents . . .' *Steele v. L. & N. R. Co.*, 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. 'The majority-rule concept is today unquestionably at the center of our federal labor policy.' 'The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338". *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, at 180 (1967).

It is submitted that the subject matter of apprenticeship programs is so broad a topic that it is not susceptible of being classified as an "individual right" in advance of an employee's assumption of apprentice status.

B. **This Court had no right to interpret the contract and/or to make a binding interpretation thereof in advance of the receipt of evidence pertaining thereto.**

The Complaint makes clear the fact that the apprenticeship program was dormant for the five (5) years preceding this action as the so-called agreement between Owens-Illinois and District 9 was allegedly consummated in 1971 (A. 3-4). Further, the numerous plaintiffs and the non-complaining members of the bargaining unit eliminates any claim that some union members were singled out for arbitrary or invidious discrimination within the meaning of *Vaca v. Sipes*, 375 U.S. 335 (1964). More obvious is the fact that the naked allegations

present here do not authorize an interpretation of the contract which forecloses evidence at time of trial to determine whether or not there was a breach of the duty of fair representation

because the Supreme Court has held that before that doctrine may be applied there exists as a matter of federal law:

> ". . . the need to adduce substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives . . ." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, at 299 (1971).

See also: *Vaca v. Sipes, supra*, at 193 where employees must prove "arbitrary or bad faith conduct on the part of the union"; or *Humphrey v. Moore, supra*, at 348 where there must be "substantial evidence of fraud, deceitful action or dishonest conduct."

The Complaint herein seeks both damages for a breach of the union's duty of fair representation and also seeks specific performance of the contracts covering the 1971-1977 period. As was shown, regarding the claim for damages the Court has erroneously dispensed with the proof required to establish that claim. With respect to the claim for specific performance the Court intruded into an area entirely forbidden to it as a matter of federal law. Since the famous *Steelworkers Trilogy*[5] the law has been crystal clear that arbitrators, not federal courts, should interpret collective bargaining agreements. The policy was stated being:

> "In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective

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[5] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. See *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 468, 45 LRRM 2719.

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The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

> The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *Steelworkers v. American Mfg. Co.*, 363 U.S. at 567-568.

This principle has recently been restated by the Supreme Court and recognized by this Court as well and has emphasized the need for *hearings* (and the reception of evidence) as well as the interpretation placed upon the contract by the arbitrator. *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976), and see also, *NLRB v. Keller-Crescent Co.*, 538 F. 2d 1291 (7th Cir. 1976).

To be certain, the present case is extraordinary in that it is a dissident group of employees who seek specific performance of the contract, in addition to damages (A. 5). Nevertheless,

should it be judicially determined that their grievance was not processed for improper reasons by their union it still does not come within the province of the court to substitute its judgment for that of the arbitrator. Indeed, all that the employees (and their union) "bargained for" within the meaning of *Steelworkers v. American Mfg. Co.* was the "arbitrators judgment." Therefore before the employees may pursue their claims for specific performance there must be a hearing and evidence relating to the interpretation of Article 20 of the contract.

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CONCLUSION

For all of the reasons set forth above and in our brief previously submitted, *Owens-Illinois* prays that this petition be granted and the Decision appealed from should be heard by this Court sitting *in banc*.

Respectfully submitted,

/s/ THOMAS M. HANNA
McMAHON, BERGER, BRECKENRIDGE,
HANNA, LINIHAN & CODY
1153 Pierre Laclede Building
7701 Forsyth Boulevard
St. Louis, Missouri 63105
A/C 314-863-0355

Dated: August 31, 1977.

Of Counsel:

McMAHON, BERGER, BRECKENRIDGE,
HANNA, LINIHAN & CODY
1153 Pierre Laclede Building
7701 Forsyth Boulevard
St. Louis, Missouri 63105
A/C 314-863-0355

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